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No. 01-800

Supreme Court, U.S.
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In The

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The parties agreed to arbitrate "all controversies" between them arising out of the petitioner's securities accounts with respondent, including "the construction . . . of this or any other agreement between" them.

The question presented is whether a court or the arbitrators should decide if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

THE PARTIES

The parties are all listed in the caption of this case. Petitioner is not a corporation.

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OPINIONS BELOW

The district court's order (Walker, D.J.), dated June 28, 1999, granting petitioner's motion to dismiss for lack of subject matter jurisdiction is unpublished. App. 31. The opinion of the Tenth Circuit Court of Appeals is published at 261 F.3d 956 (10th Cir. 2001). App. 1.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion and judgment was entered August 9, 2001. App. 1. Petitioner did not petition for rehearing or for rehearing *en banc* prior to filing her petition. 10th Cir. R. 35.1(B). The Petition for Writ of Certiorari was filed on November 6, 2001, and granted by this Court on February 25, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED IN THIS CASE

(1) The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, specifically, § 2, provides,

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract.

(2) Section 10304[1] of the NASD Code of Arbitration Procedure provides:

> **Time Limitation Upon Submission.** No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

(3) Section 10324[2] of the NASD Code of Arbitration Procedure provides:

> **Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings.** The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

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[1] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 15 was changed to NASD Code § 10304. The text of § 10304 is identical to the text of § 15, and, therefore, the case law interpreting § 15 applies equally to § 10304.

[2] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 35 was changed to NASD Code § 10324. The text of § 10324 is identical to the text of § 35, and, therefore, the case law interpreting § 35 applies equally to § 10324.

STATEMENT OF THE CASE

After her husband's death in 1986, petitioner Karen Howsam ("Howsam") opened securities accounts with respondent Dean Witter Reynolds, Inc. ("DWR") for herself and for a family trust. DWR and its registered representative purchased a number of limited partnerships for the accounts at a total cost of about $550,000. The partnerships were represented to Howsam to be long term investments which would provide income and growth in value for five to ten year periods, after which either the partnerships would have sold their properties or Howsam would sell her partnership interests. Through March 1992, the partnerships were valued on monthly account statements at their purchase costs. After March 1992, the partnerships were not valued at all on the account statements, but DWR's registered representative repeatedly assured Howsam that they continued to be good and valuable investments.

In late 1994, Howsam began to receive correspondence from the partnerships alerting her to the fact that they had suffered serious losses in value since their purchases in 1986. Howsam subsequently closed the DWR accounts.

The DWR customer agreement Howsam signed in 1992 contained an arbitration clause, requiring her to arbitrate disputes with DWR. In March 1997, Howsam commenced arbitration by filing uniform submission agreements (J.A. 24-38) and a statement of claim (J.A. 10-23) alleging breaches of fiduciary duties by DWR and its registered representatives with the National Association of Securities Dealers, Inc. ("NASD"). The breaches included failure to recommend and sell Howsam investments which

were suited to her and the trust's investment objectives, failure to advise Howsam that the investments were or had become unsuitable for her and the trust, and failure to monitor the investments and to keep Howsam apprised of their value so that she could make informed decisions with respect to their sale or retention prior to late 1994.

In July 1997, DWR filed a complaint in the district court (J.A. 39-46) seeking declaratory relief and to enjoin the arbitration from proceeding. DWR asserted jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1391(b), and 2201. DWR contended that the events giving rise to the arbitration claims occurred more than six years prior to the commencement of arbitration, thus making them ineligible for arbitration pursuant to NASD Code of Arbitration Procedure (the "Code") § 10304.

By order dated June 28, 1999, the district court granted Howsam's motion to dismiss DWR's complaint for lack of subject matter jurisdiction, holding that the eligibility issues presented by DWR's complaint must be determined by the arbitrators rather than the court. The district court found that the operative agreement to arbitrate was contained in an August 1992 Client Service Agreement (the "1992 Agreement") which provided, in relevant part,

> The Client agrees that all controversies between the Client and Dean Witter ... concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client ... ; or (iii) the construction, performance or breach of this or any other agreement between us ... shall be determined by arbitration ....

J.A. 6-7.

The 1992 Agreement further provided that it was governed by the law of the State of New York. J.A. 6. Relying on *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), and *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996), the district court determined that "the totality of this broad language [the arbitration provision of the 1992 Agreement] clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section [10304], arbitrated and not judicially determined." App. 34 (emphasis in the original).

The Tenth Circuit reversed, concluding that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable." App. 2.

In *Cogswell*, in which the Tenth Circuit had earlier held that courts rather than arbitrators should decide § 10304 eligibility issues, the court specifically stated that because the customer agreement was to be "construed in accordance with the laws of the State of New York," it applied New York's "principles of contract interpretation to determine the meaning of the agreement," *Id.* at 478, citing *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). After *Cogswell* was decided, the highest court in New York decided *Sacharow*, in which it held that an arbitration clause virtually identical to that contained in Howsam's 1992 Agreement clearly and unmistakably evidenced the parties' intent to submit § 10304 eligibility issues to the arbitrators.

The 1992 Agreement contained a provision that it was to be "construed and enforced in accordance with the laws

of the State of New York." Nevertheless, the Tenth Circuit rejected Howsam's contention that it should follow New York's construction of the arbitration clause, holding that the Federal Arbitration Act, 9 U.S.C. § 2, and related case law, created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." App. 20 (citation omitted).

The Tenth Circuit recognized "that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts." App. 28.

SUMMARY OF THE ARGUMENT

Resolution of disputes through arbitration is a matter of agreement. Parties are not required to arbitrate unless they have agreed to do so. Like most other brokerage firm customers, Howsam signed a pre-printed, standard form agreement which contained an arbitration clause. That clause required arbitration of all disputes with DWR arising out of her DWR accounts, past, present, or future, before the NASD or any exchange of which DWR was a member.

Howsam elected to arbitrate before the NASD, which, like the exchanges, has a rule, § 10304, entitled "Time Limitation Upon Submission," which states that claims are not "eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." J.A. 48.

DWR brought an action to enjoin the arbitration, on the ground that Howsam's claims were ineligible under the NASD's timeliness rule, which the trial court properly dismissed. The Tenth Circuit erred when it reversed the trial court's judgment on the ground that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable." App. 2.

Howsam and DWR agreed to arbitrate "all controversies" between them arising from Howsam's accounts, transactions, or "the construction, performance or breach of this or any other agreement between us. . . ." J.A. 7. There is no dispute that Howsam's claims arose out of her DWR accounts and transactions, and thus fall within the scope of the arbitration agreement. Notwithstanding the use of the words "eligible for submission to arbitration under this Code" in the time limitation rule, the timeliness issue is not one of arbitrability. It is instead a defense similar to statutes of limitation or repose.

Even if the time limitation contained in the NASD rule is an arbitrability issue, the Court should allow the arbitrators to decide it because the parties have clearly and unmistakably agreed to submit it to arbitration. The evidence of their clear and unmistakable intent to do so is contained in the arbitration agreement itself and/or by incorporation of the Code, which includes § 10324. Section 10324 provides that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under" the Code, which interpretation "shall be final and binding upon the parties." J.A. 48.

Arbitration is intended to provide faster and less expensive resolution of disputes than the court system affords. Having imposed arbitration upon its customers through the use of standard arbitration clauses in customer agreements, DWR, particularly as the drafter of the agreement, must be held to its agreement to submit all disputes to arbitration. Otherwise, as in Howsam's case, DWR and other firms can and will discourage claims against them by prolonging the dispute resolution process with litigation and causing customers to incur undue and unanticipated expense.

ARGUMENT

I. ARBITRATION AND SECURITIES INVESTORS

A. The Federal Arbitration Act

Private arbitration has existed as a means of resolving disputes since ancient Greece, Rome, and Israel. C. Edward Fletcher, *Arbitrating Securities Disputes*, 12 (PLI, 1990). Initially, in the United States, however, there was a widespread judicial mistrust of arbitration. Many courts refused to enforce mandatory arbitration clauses because they believed that arbitration took jurisdiction away from the courts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 n.4 (1974). In response to the judicial hostility towards arbitration, in 1925, Congress passed the Federal Arbitration Act ("FAA").

In passing the FAA, Congress sought to "place arbitration agreements on equal ground with other, more accepted contractual arrangements" and to overcome judicial disapproval of arbitration. H.R. Rep. No. 96, 68th Cong.,

1st Sess., 1 (1924). According to the House Report accompanying the FAA:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 n.6 (1985).

Section 2 of the FAA, which is the primary substantive provision of the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such

> grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994).

This language mandates that arbitration agreements be enforced "as a matter of contract law" by both federal and state courts. Accordingly, the FAA transformed arbitration into a judicially approved method of dispute resolution. Dennis O'Leary, *PaineWebber v. Elahi: The First Circuit Provides a Return for Investors and Allows Them Their Day in Arbitration*, 32 New Eng. L. Rev. 553, 560 (Winter 1998).

In the seminal case of *Moses H. Cone Mem'l Hosp.*, the Court confirmed that the FAA demonstrates a *strong* federal policy in favor of arbitration, applicable both in state and federal courts. 460 U.S. at 24. The opinion additionally instructs that any doubts concerning the arbitrability of an issue should be resolved in favor of arbitration. In frequently cited language, the Court stated:

> Federal law in the terms of the Arbitration Act governs [the issue of whether the dispute was arbitrable] in either state or federal court .... Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act .... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language

> itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25.

B. Supreme Court Precedent in Securities-Related Arbitration

When an individual investor opens an account with a securities broker, he or she invariably must sign a standard-form contract as a precondition of conducting business with the broker. This non-negotiable contract, often referred to as a "Customer Agreement," generally contains an arbitration clause under which the parties agree to submit any future disputes to arbitration conducted by one of the securities industry's self-regulatory organizations ("SRO"). Proceedings initiated under the broad and inclusive arbitration clause are subject to arbitration guidelines established by the SROs, a group which includes all the major stock exchanges and the NASD. Guy Nelson, *The Unclear "Clear and Unmistakable" Standard: Why Arbitrators, Not Courts, Should Determine Whether a Securities Investor's Claim is Arbitrable*, 54 Vand. L. Rev. 591, 592 (March 2001). A history of the development of securities industry arbitration from the mid-1880's is contained in Norman S. Poser's *Making Securities Arbitration Work*, 50 SMU L. Rev. 277, 280-287 (September/October 1996).

Mandatory brokerage firm arbitration agreements were not always favored. In 1953, the Court decided *Wilko v. Swan*, 346 U.S. 427 (1953), the first reported Supreme Court case addressing arbitration of claims alleging violations of the federal securities laws. Concerned that mandatory arbitration denied investors the protection afforded them under the securities acts, the Court

pronounced that pre-dispute arbitration agreements relating to matters arising under the Securities Act of 1933 ("1933 Act") were not enforceable in light of § 14 of the 1933 Act, the non-waiver provision. The Court held that an investor could not waive the right to bring an action under the 1933 Act. Most federal courts believed that the same reasoning applied to claims under the Securities Exchange Act of 1934 ("1934 Act"). *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore,* 590 F.2d 823 (10th Cir. 1978). The courts' refusal to enforce pre-dispute arbitration agreements in cases brought by investors against brokerage firms continued for the next 30 years.

In 1985, in *Byrd*, the Court took a large step toward abolishing the *Wilko* doctrine. In *Byrd*, the customer-plaintiff alleged claims under state law and the 1934 Act. The issue was whether a federal court could try both arbitrable and nonarbitrable claims together if they were sufficiently factually and legally "intertwined" or whether the claims must be bifurcated. The Court held that bifurcation was mandated by the FAA, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. In so holding, the Court reasoned that the primary goal of the FAA was to enforce private agreements to arbitrate and that this goal takes precedence over the secondary goal of encouraging efficient and speedy dispute resolution. In a concurring opinion, Justice White observed that although the question of whether the *Wilko* doctrine applied to 1934 Act claims was not before the Court, there was "substantial doubt" on this question.

In the same term *Byrd* was decided, the Court held, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473

U.S. 614 (1985), that an agreement to arbitrate disputes arising under the Sherman Act was enforceable, stressing that commercial arbitration agreements must be enforced according to their terms.

Two years later, in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), in a 5-4 decision, the Court held that claims under the 1934 Act were arbitrable. In so deciding, the majority opinion reasoned that the *Wilko* court had been concerned that the arbitration procedures which existed in 1953 were inadequate to ensure protection of investors' substantive rights under the securities laws. Since *Wilko*, however, Congress had given the Securities and Exchange Commission ("SEC") additional powers to review the arbitration procedures employed by the SROs and to ensure their adequacy. The Court concluded that the concerns expressed in *Wilko* were no longer present and that the parties' agreement to arbitrate 1934 Act claims was enforceable.

Although the *McMahon* dissent stated that the majority's decision effectively overruled *Wilko*, it was not officially overruled until two years later when the Court decided *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Finding that no relevant distinction existed between the 1933 and 1934 Acts, *Rodriguez* established that pre-dispute arbitration agreements with respect to claims under the 1933 Act also were valid, thereby removing the *Wilko* exception to arbitrability of customer claims.

II. THE TIME LIMITATION "ELIGIBILITY" RULE

In SRO arbitrations, state and federal statutes of limitation are supplemented by time limitation rules. Regardless of the SRO forum elected by the parties, the procedures that govern the arbitration are, for the most part, the same. All SROs which sponsor arbitration programs have adopted, with the approval of the SEC, the Uniform Code of Arbitration ("UCA") developed by the Securities Industry Conference on Arbitration ("SICA"), a task force created by the securities industry for the purpose of responding to SEC concerns over the lack of uniformity in the rules governing arbitration among the various SROs. Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power,* 46 DePaul L. Rev. 109, 120 (Fall 1996).

The arbitration clause at issue here provides that controversies "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." J.A. 7. Howsam chose to bring her arbitration proceeding before the NASD.

The NASD's time limitation rule, § 10304 of the Code, provides as follows:

> **Time Limitation on Submission.** No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case

> which is directed to arbitration by a court of competent jurisdiction.[3]

J.A. 48. The rule was adopted almost verbatim from the UCA's time limitation rule, as amended in 1984. According to Professor Constantine Katsoris, an original public member of SICA, the rule was included in the UCA as a matter of convenience to prevent stale claims from going to arbitration. Six years was chosen as the time period because it "dovetailed" the SEC's books and record-keeping retention requirement. Harding, 46 DePaul L. Rev. at 141.

The time limitation rule may prevent a claim from proceeding in arbitration even where a statute of limitation may not yet have run on the claim. Although few claims have statutes of limitation as long or greater than six years, such statutes generally do not begin to run until the cause of action "accrues" when both the injury and its cause are known or should have been known by the exercise of reasonable diligence. *See, e.g.,* § 13-80-108, Colorado Revised Statutes.[4] In addition, equitable tolling may extend the time a customer has to assert a claim in court. Thus, although ostensibly the Court's endorsement of SRO arbitration as an alternative for the resolution of disputes between investors and broker-dealers was based in part on the presumption that customers do not give up

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[3] Rule 603 of the New York Stock Exchange Arbitration Rules and Rule 605 of the American Stock Exchange Rules are substantially the same and are titled "Time Limit Upon Submission" and "Submission Limitations," respectively.

[4] "**When a cause of action accrues.** (1) . . . a cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."

substantive rights when agreeing in advance to arbitrate a dispute, the time limitation rule, as interpreted and applied by the courts and the SROs, may result in the loss of the most basic of substantive rights: the right to seek redress for wrongful conduct, a right the investor would have had but for the SRO time limitation rule. *Mitsubishi*, 473 U.S. at 627-628.

The SROs' time limitation rules, also referred to as "eligibility" rules, have generated a great deal of litigation, much of it relating to the question before the Court today: whether the arbitration panel or the district court should decide the rules' applicability. In general, brokerage firms argue that the question is for the courts to decide, while customers usually take the opposite position. Often, as in this case, after customers have filed arbitration claims, brokers have gone to court for injunctive relief and a determination of whether the claims fall within the six year period. Thus, although securities arbitration is touted as a speedy and inexpensive alternative to litigation, brokers can impose expensive and lengthy litigation before the customer ever reaches arbitration.

III. THE "CLEAR AND UNMISTAKABLE" REQUIREMENT

A. *AT&T Technologies, Inc. v. Communications Workers of America*

In 1986, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), the Court set forth the current standard used to determine the issue of *who*, the courts or the arbitrators, will determine whether a dispute is arbitrable under the terms of a predispute arbitration agreement.

The debate in *AT&T Technologies* concerned arbitration of disputes arising out of a collective-bargaining agreement, entered into between AT&T and its Union. Article 8 of the agreement contained a standard arbitration clause which provided that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be arbitrated. *Id.* at 645. Article 9, however, excluded from arbitration AT&T's decisions involving management judgments, including, without limitation, the hiring and termination of employees. Article 20 imposed the order in which workers were to be laid off due to lack of work. A dispute arose when AT&T laid off 79 workers from its Chicago-based location.

Relying on Article 9, AT&T refused to submit the workers' grievance to arbitration, insisting that "the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable." *Id.* at 646. The Union, on the other hand, argued that, pursuant to Article 20, a lay off required a work shortage. In its suit to compel arbitration, the Union argued that it was for the arbitrator, not the courts, to decide whether the lay offs were justified by lack of work. *Id.*

The district court found that "the union's interpretation of Article 20 was at least 'arguable'" and held that it was "for the arbitrator, not the court, to decide whether the union's interpretation has merit." *Id.* at 647. Accordingly, the district court ordered AT&T to arbitrate. The Seventh Circuit affirmed, acknowledging the general rule that courts, not arbitrators, are to decide issues of arbitrability, but carving out an exception to the general rule where (1) the agreement contains a standard arbitration clause; (2) the parties have not clearly excluded the

arbitrability issue from arbitration; and (3) deciding the issue would entangle the court in interpretation of substantive provisions of the agreement and thereby involve consideration of the merits of the dispute. *Id.* at 648. Because all of those factors were present, the Seventh Circuit declined the invitation to decide arbitrability and ordered AT&T to arbitrate the issue.

This Court granted certiorari, rejected the Seventh Circuit's exception to the general rule, and reversed. In doing so, the Court relied on a series of cases, decided some 25 years prior, known as the Steelworkers Trilogy: *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Trilogy established the following four principles:

First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582; *American Mfg. Co.*, 363 U.S. at 570-571. This premise recognizes the fact that arbitrators have authority to resolve disputes only because the parties agreed in advance to submit them to arbitration. Second, "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies*, 475 U.S. at 649, *citing Warrior & Gulf*, 363 U.S. at 582-583. Third, a court has "no business weighing the merits of the" underlying claim when it reviews the arbitrability issue. *American Mfg. Co.*, 363 U.S. at 568. Finally, where the

contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[5] *Warrior & Gulf*, 363 U.S. at 582-583.

With these principles in mind, this Court determined that it is for the court, not the arbitrators, to decide in the first instance whether the parties intended the dispute to be resolved through arbitration, and that intent must be demonstrated by "clear and unmistakable" evidence. Once it is determined that the parties *intended* to submit the *subject matter* of the dispute to arbitration, the arbitrator, and not the court, then determines all procedural questions which grow out of the dispute and bear on its final disposition. *AT&T Technologies*, 475 U.S. at 651. The case was remanded for determination of whether AT&T was required to arbitrate.

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[5] Such a presumption is particularly applicable where the clause is as broad as the one utilized in *AT&T Technologies*, which provides for arbitration of " 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, '[in] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' " *AT&T Technologies*, 475 U.S. at 650, *citing Warrior & Gulf*, 363 U.S. at 584-585.

B. *First Options of Chicago, Inc. v. Kaplan*

In *First Options v. Kaplan*, 514 U.S. 938 (1995), the Court confirmed the standard for determining arbitrability in the context of a pre-dispute securities arbitration agreement. Kaplan's wholly-owned investment company had signed an agreement containing an arbitration clause, but the Kaplans had not individually signed such an agreement. First Options sought arbitration of claims against the investment company and the Kaplans for money they owed First Options.

The Kaplans denied they were obligated to arbitrate. The arbitrators decided they had power to rule on the dispute and entered an award against the Kaplans. The Kaplans then requested that the district court vacate the award, and First Options requested its confirmation. The district court confirmed the award. On appeal, the Third Circuit agreed with the Kaplans that their dispute was not arbitrable. *Id.* at 941.

This Court granted certiorari and affirmed the Third Circuit's ruling. In doing so, the Court applied the "clear and unmistakable" standard laid out in *AT&T Technologies*, explaining that "arbitration is simply a matter of contract between the parties," a way to resolve disputes, but only those disputes the parties have agreed to arbitrate. *First Options*, 514 U.S. at 943. In determining whether parties have agreed to submit the arbitrability question to arbitration, courts should apply ordinary state law principles that govern the formation of contracts. *Id.* at 944.

First Options clarifies that courts should presume in favor of arbitration only where the scope and breadth of

the arbitration agreement, and not the agreement itself, are at issue, unless the agreement at issue "clearly and unmistakably" provides otherwise.

Neither *AT&T Technologies* nor *First Options* discussed in detail what constitutes "clear and unmistakable" evidence of the parties' intent to have the arbitrator decide issues of arbitrability. Parties faced with the issue, as well as the lower courts charged with applying the "clear and unmistakable" standard, have disagreed on whether clauses such as those contained in Howsam's agreement meet the standard. Moreover, courts have disagreed on the question of whether or not the SROs' six year time limitation is an arbitrability issue.

IV. THE CONFLICT AMONG THE CIRCUITS AND STATE COURTS

The issue of whether courts or arbitrators should decide eligibility for arbitration under § 10304 of the Code has been the subject of numerous conflicting rulings from various state and federal courts. Five federal circuits have determined that courts, not arbitrators, should decide the issue of § 10304 eligibility. *See, e.g., Painewebber, Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381 (11th Cir. 1995).

Five federal circuits have held to the contrary, holding that the decision is reserved for arbitrators. *See, e.g., Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996);

PaineWebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982).

State courts have similarly split on the question of whether courts or arbitrators should decide the question of § 10304 eligibility. *See, e.g., Cigna Fin. Advisors v. Rosen*, No. CV 94 0705235 (Conn. Super. Ct. Jan. 9, 1995), 1995 Conn. Super. LEXIS 74 (holding that courts decide eligibility question); *Citibank v. Crowell, Weedon & Co.*, 4 Cal. App. 4th 844 (Cal. App. 1992) (construing identical language in Municipal Securities Rulemaking Board Arb. Code, rule G-35, Sec. 6, holding courts decide); *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997) (holding arbitrators decide); *Shahan v. Staley*, 188 Ariz. 74, 932 P.2d 1345 (Ariz. App. 1996) (to same effect).

To complicate matters further, the courts deciding these cases have reached their decisions using conflicting lines of reasoning. *Cf. Boone*, 47 F.3d at 753-54 (holding that § 10304 eligibility is arbitrability question, but is one of procedural rather than substantive arbitrability, thus determinable by the arbitrators), and *Elahi*, 87 F.3d at 599 (holding that § 10304 eligibility is presumptively not an arbitrability issue, unless parties clearly and unmistakably express an intent to make it so). *Cf. also Freel*, 14 F.3d 1310 (basing its holding on the fact that § 10324 unambiguously grants arbitrators power to decide all issues under the Code), and *Bybyk*, 81 F.3d 1193 (basing its holding on contract interpretation principles which call for courts to construe an ambiguous provision against the drafter).

V. COURTS SHOULD DECIDE ONLY THE THRESHOLD QUESTION OF SUBJECT MATTER ARBITRABILITY

Over 30 years ago, the Court provided a carefully reasoned analysis of the question of which issues should be decided by courts and which by arbitrators. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), an issue arose as to whether the court or the arbitrator should determine whether a union abandoned its grievance by failing to comply with a contract requirement that notice of a grievance be filed with the Union Shop Steward within four weeks after the event's occurrence or latest existence. Justice Harlan, writing for a unanimous Court, held that the dispute, including the question of whether the prerequisite to arbitration had been met, should be submitted to the arbitrator. In so deciding, the Court addressed the problem of attempting to distinguish between "substantive arbitrability" issues and "procedural arbitrability" issues:

> We think that labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

Id. at 556-557. The opinion goes on to explain that "[i]t would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other." *Id.* at 557. Thus, if "the parties

are obligated to submit the *subject matter* of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* (emphasis added). Any other conclusion would produce duplication of effort and an opportunity for deliberate delay.

Here, as a typical brokerage firm customer signing a typical pre-printed form agreement, Howsam agreed to arbitrate all claims and disputes arising out of her account, the "subject matter." Because Howsam's claims undeniably arise out of securities transactions in her accounts, they are arbitrable. The timeliness issue raised under § 10304 is merely a procedural prerequisite to arbitration, and is thus for the arbitrators to decide in accordance with the Court's holding in *John Wiley*. Once it is established that the arbitrators have jurisdiction of the subject matter, leaving issues such as timeliness to the arbitrators raises no cause for concern that arbitration is being imposed on a non-consenting party.

The difficulty of allowing "minitrials" to determine which claims, or portions of claims, fall within or without the six year period is amply demonstrated in the Third Circuit's *Hofmann* opinion, which spends pages instructing the trial court. The court states that the trial court will have to hold a hearing and may have to receive extrinsic evidence in deciding which claims are arbitrable. The court acknowledges that "the district court will be forced to walk a fine line" in balancing the rule that parties should not be forced to arbitrate matters they have not agreed to arbitrate against the rule that courts must not decide potential merits of the underlying claims. It acknowledges that "[a]t times, it will be impossible to give

full effect to both of these goals . . . ." *Hofmann*, 984 F.2d at 1381.

John Wiley anticipated just this type of quandary and instructed that courts should avoid carving up such intertwined issues between two different forums.

VI. SECTION 10304 IS A PROCEDURAL RATHER THAN SUBSTANTIVE RULE, AND IS THUS FOR THE ARBITRATORS TO APPLY

In *Boone*, Boone filed an arbitration claim against Smith Barney Shearson ("SBS") with the American Stock Exchange ("AMEX"). In response, SBS filed an action in district court seeking injunctive and declaratory relief preventing Boone from arbitrating his claims, arguing the claims were ineligible for arbitration under AMEX Rule 605 (AMEX's version of § 10304). The district court denied SBS the relief it sought, stating that "under established Fifth Circuit Court precedent, the timeliness question should be decided by the arbitrator and not by a federal court." *Boone*, 47 F.3d at 751. The same district court held against SBS on a similar complaint involving § 10304, and the cases were consolidated for appeal. *Id.* at 752.

Relying on *John Wiley*, the Fifth Circuit stated that "[f]rom the broad language of the Customer Agreements it is clear that [the parties] intended to have 'any controversy' arising between them resolved through arbitration" and held that the timeliness issues were "issues of procedural arbitrability and must be decided by the arbitrator." *Boone*, 47 F.3d at 754. *See also Freel*, 14 F.3d at 1312, in which the court questions, but does not decide, whether the eligibility rule is one of "procedural arbitrability." The court, in footnote 2, cites *Miller v. Prudential Bache*

Securities, Inc., 884 F.2d 128 (4th Cir. 1989), and *Gaines v. Financial Planning Consultants, Inc.*, 857 S.W.2d 430 (Mo. App. 1993), in support of its holding that § 10304 issues are procedural and therefore to be determined by the arbitrators.

The "broad language" in the *Boone* customer agreements provided:

> any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Security Dealers, Inc. and/or the American Stock Exchange, Inc. as I may elect.

47 F.3d at 751 n.1.

Howsam's 1992 Agreement is even more broad than those considered in *Boone*. The 1992 Agreement includes in the matters to be arbitrated "the construction . . . of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof . . . ." J.A. 7.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court stated:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of *waiver, delay, or a like defense* to arbitrability.

Id. at 62 n.8 (emphasis added), quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Section 10304 is akin to

"waiver, delay or like defense" and should be viewed as procedural rather than substantive.

VII. THE § 10304 TIME LIMITATION ISSUE IS NOT AN ISSUE OF ARBITRABILITY, AND THUS, PRESUMPTIVELY MUST BE DECIDED BY THE ARBITRATOR

One author has written that the threshold arbitrability issues which should be determined by courts are whether there was an agreement to arbitrate, whether the agreement to arbitrate covered the subject matter of the dispute, and whether the party opposing arbitrability executed the arbitration agreement.

> Extending the scope of arbitrability questions beyond these threshold issues circumscribes the discretion allowed to the arbitrators and thereby reduces or destroys the usefulness of arbitration. For example, if the rules of an arbitral forum require that a statement of claim specify the relevant facts and the remedies sought, it would be both absurd and destructive to say that the question whether a statement of claim complies with this requirement is a question of arbitrability and therefore for the court to decide. Yet to hold . . . that the [NASD's] eligibility rule raises a question of arbitrability is not much less absurd or much less destructive.

Poser, 50 SMU L. Rev. at 329.

In *Elahi*, a case involving an arbitration clause similar to that in the 1992 Agreement, the First Circuit presumed that where the parties had entered into a valid arbitration agreement which "covers the subject matter of the underlying dispute," "the parties have made a

commitment to have an arbitrator decide all the remaining issues necessary to reach a decision on the merits of the dispute." 87 F.3d at 599. As the court wrote, the entry by the parties into a valid agreement satisfied the *First Options* arbitrability threshold, and the agreement's coverage of the subject matter of the dispute satisfied the *AT&T* arbitrability requirement. Based upon the breadth of the arbitration clause and the unlikelihood that the parties intended such issues as timeliness of submission to affect the arbitrability of the dispute, the court presumed "that the parties here did not intend to make the section [10304] time bar a threshold 'arbitrability' question to be determined by the courts rather than an arbitrator." *Elahi*, 87 F.3d at 600.

The court then looked to the agreement between the parties "for any clear and unmistakable expression of an intent contrary to that presumption" and found none. *Id.* It pointed out, in footnote 11, that it was unlikely that an investor would have any intent whatsoever with regard to § 10304 or have detailed knowledge of the NASD arbitration rules. It further found that the phrase "submission to arbitration" found in § 10304 "could mean submission for full adjudication of the merits, rather than submission for preliminary determinations, such as whether the claim is time-barred, or whether the appropriate fee was paid, or whether the claim was submitted on the proper forms." *Id.*

The court noted that the NASD had itself stated that "Section [10304] does not specify who has the authority to determine if a claim is eligible for submission to arbitration. 59 Fed. Reg. 39,373, 39,373-74, quoted in *Cogswell*, 78 F.3rd at 479-80." It therefore concluded that the "eligible for submission" language in § 10304 "is not a clear expression of intent to make timeliness an arbitrability

issue." *Id.* at 601. The court further found that § 10324, empowering the arbitrator to "interpret and determine the applicability of all provisions under this Code," *id.* at 598, also countered the argument that the parties intended § 10304 issues to be determined only by the courts. It stated that because § 10304 is part of the Code, one would assume that it was intended that the NASD itself apply it. It also noted that the Code cannot be part of the parties' agreement until the NASD is chosen as an arbitration forum.

In footnote 12, the *Elahi* court noted that *John Wiley* and its progeny would justify its decision but that "simply labelling timeliness issues as 'procedural,' and thus for the arbitrator, does not give due regard to the parties' contractual intent," since the parties could contractually make timeliness an arbitrability issue. *Id.* at 601.

The presumption announced by the Court in *John Wiley*, and followed in *Elahi* and *Boone*, is that issues other than (1) the existence of an arbitration agreement between the parties and (2) whether the subject matter of the underlying dispute is within the scope of the arbitration clause are not "arbitrability" issues. *Elahi*, 87 F.3d at 599. This presumption must not be confused with and in no way diminishes the presumption established in *AT&T Technologies* and *First Options*, that issues of arbitrability are normally to be decided by courts, not arbitrators. *Id.*

VIII. THERE IS CLEAR AND UNMISTAKABLE EVIDENCE OF THE PARTIES' INTENT THAT THE ARBITRATORS DECIDE § 10304 ISSUES

If the Court decides that § 10304 does present an arbitrability issue for a court to determine in the first

instance, it should also decide that the parties' pre-dispute arbitration agreement demonstrates clear and unmistakable evidence of their intent to submit § 10304 issues to the arbitrator.

The Court has consistently held that arbitrability questions are matters of contract interpretation. The basic premise is that a party cannot be forced to arbitrate any issue it has not agreed to submit to arbitration. *AT&T Technologies,* 475 U.S. at 648. As a rule, arbitrability issues should first be determined by the courts. However, the parties may provide that such issues be determined by the arbitrators if they do so clearly and unmistakably. *First Options*, 514 U.S. at 938.

If the *First Options* analysis is applied to the 1992 Agreement's arbitration clause, it must be concluded that the arbitrators are to determine timeliness under § 10304. The agreement provides that "all controversies" between the parties concerning or arising from Howsam's account or any transactions involving Howsam and DWR or "the construction, performance or breach" of any agreement between the parties "shall be determined by arbitration . . . ." J.A. 7. The 1992 Agreement further provides that "[t]he parties are waiving their right to seek remedies in court, including the right to jury trial." J.A. 6.

Where, as here, there is no dispute that the arbitration agreement exists and was in fact executed by the parties, and where Howsam's claims arise out of her accounts and transactions with DWR, the clear and unmistakable intent of the parties is to submit all controversies, including timeliness of the claims, to the arbitrators.

The Second Circuit, in *Bybyk*, applied the clear and unmistakable evidence standard to an agreement virtually identical to the 1992 Agreement. Referring to the provision that any and all controversies are to be determined by arbitration, the court stated:

> The wording is inclusive, categorical, unconditional and unlimited. The words 'any and all' are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration. That provision expressly includes the category of disputes regarding the construction of the Agreement – such as whether it incorporates the NASD Code . . . .
>
> The parties' broad grant of power to the arbitrators is unqualified by any language carving out substantive eligibility issues (with or without specific reference to timeliness) for resolution by the courts. PaineWebber is thus unable to overcome the presumption established in the first of the above-listed provisions that 'any and all controversies' are to be arbitrated. An objective reading of the Agreement, therefore, leads us to conclude that the parties intended to arbitrate issues of arbitrability. Put another way, no draftsman seeking a six-year limitation on the scope of arbitrability would craft this language to accomplish that objective. If the Bybyks' claim is untimely, PaineWebber's remedy is to defend the arbitration action on timeliness grounds, not to enjoin arbitration all together.

81 F.3d at 1199-1200.

Those courts, including the Tenth Circuit, in *Cogswell* and this matter below, and the Eleventh Circuit, in *Cohen*, which purported to apply *First Options* to similar

agreements and found that courts should determine eligibility under § 10304, did not give proper deference to the plain meaning of the parties' arbitration agreements. If the customers read and understood the arbitration clauses in their customer agreements, they were led to believe that any and all controversies arising out of their accounts and transactions with the broker/dealers would be arbitrated. There is little chance that they were aware of § 10304 at the time they signed their agreements. It therefore makes little sense to rely on that rule in attempting to ascertain the customer's intent, particularly when the effect of the rule is potentially to deny the investor the opportunity to arbitrate his claims, even though statutes of limitation have not run on such claims.

A. *Mastrobuono's* Instructions on Contract Interpretation

Mastrobuono, announced by the Court in the same term as *First Options*, provides guidance for analysis of pre-dispute arbitration agreements. The issue in that case was "what the contract has to say about the arbitrability of petitioners' claim for punitive damages." 514 U.S. at 58. The Court applied three established common law principles of contract interpretation: first, pre-dispute arbitration agreements and the Code should be construed as a single writing and interpreted as a whole; second, all of the documents comprising a single agreement should be considered consistent with each other; and third, ambiguous language should be construed against the drafting party. As will be shown following, application of those three principles to the 1992 Agreement further shows that the parties "clearly and unmistakably" intended that the arbitrators decide timeliness issues under § 10304.

1. The 1992 Agreement, § 10304, and § 10324 Should Be Interpreted As Part Of An Overall Agreement

The first principle asserted in *Mastrobuono* is that provisions of the parties' agreement and the arbitration code should be read together as a whole. This approach comports with § 202(2) of the *Restatement, Second, Contracts*, which states that "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."

There is no provision in the 1992 Agreement or other typical customer agreements limiting the time within which arbitration may be pursued. Section 10304 is the provision relied upon by DWR in seeking to prevent arbitration. Section 10324, which is contained in the same Part 10300 (formerly Part III) of the Code as § 10304, provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code .... Such interpretations ... shall be final and binding upon the parties.

J.A. 48. The arbitrators are thus designated to interpret and apply § 10304 and, in doing so, to determine what claims are eligible thereunder for submission to arbitration.

The Eighth Circuit, in *Freel*, held that when the parties agreed to submit their dispute to the NASD, "they adopted the entire NASD Code, including Section [10324]. Unlike the Seventh Circuit, we hold that the parties' adoption of this provision is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators." 14 F.3d at 1312-1313. The court

read the Code as a whole and saw no reason that § 10324 should not authorize arbitrators to apply § 10304. *Freel* has been followed in a number of state courts, including *Mid-State Sec. Corp. v. Edwards*, 309 N.J. Super. 73, 706 A.2d 773 (1998); *Keeney*; *Shahan*; *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409 (Mo. App. 1995); and *Gaines*.

The Eighth Circuit's reliance on § 10324 makes good sense. Section 10304 does not specify who will determine timeliness. Section 10324 does so by expressly granting arbitrators the power to interpret and determine all Code provisions. Accordingly, Howsam, who elected the NASD and its rules, and DWR, which was contractually bound by Howsam's selection, agreed that the arbitrators would determine all issues, including timeliness under § 10304.

2. Contract Provisions Should Be Construed as Consistent with Each Other

The second contract principle to which the Court referred in *Mastrobuono* is "that a document should be read to give effect to all its provisions and to render them consistent with each other." 514 U.S. at 63. This principle is found in §§ 202(5) and 203(a) of the *Restatement, Second, Contracts*. Section 202(5) states that "[w]herever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other . . . ."

Application of this standard discredits the principal argument employed by the *Sarver*, *Cohen*, and *Cogswell* courts. For instance, in finding that neither the provisions of the Code nor the customer agreements at issue met the

"clear and unmistakable" standard, *Cogswell* relied heavily on the premise that *specific* provisions, such as § 10304, prevailed over *general* provisions, such as § 10324. However, *Cogswell* does not contend that §§ 10304 and 10324 conflict. Section 10304 lays out a time limitation for claims, but does not indicate whether a court or arbitrators should interpret and apply it. Section 10324 does not specifically mention § 10304, but declares that the applicability of all provisions of the Code will be interpreted and determined by the arbitrators. There is no conflict; the two sections address different issues and § 10324 supplements § 10304. *Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund*, 579 N.W.2d 518, 526 (Neb. 1998).

Cogswell's and the other court's strained application of the general rule regarding specific versus general contract provisions violates the cardinal principle of contract construction laid out in the *Restatement* and approved by this Court in *Mastrobuono*. The interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a portion of the agreement with no effect. *Keeney*, 570 N.W.2d at 78. Interpreting the Code as internally consistent and consistent with the 1992 Agreement creates an irrefutable presumption that the parties "clearly and unmistakably" agreed to leave *all* decisions regarding the applicability of § 10304 to the arbitrators.

3. Ambiguous Language Is Construed Against the Drafting Party

The 1992 Agreement and the Code provide "clear and unmistakable" evidence that the parties intended the arbitrators to decide the eligibility issue. Nevertheless, if the Court were to find the 1992 Agreement ambiguous,

application of the third contract principle pronounced in *Mastrobuono* resolves the issue in Howsam's favor. DWR is bound by the common law rule of contract interpretation that "a court should construe ambiguous language against the interest of the party who drafted it." *Mastrobuono*, 514 U.S. at 62.

According to the *Restatement*,

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

§ 206, comment a, *Restatement, Second, Contracts*.

That principle of law applies to the facts of this case. DWR has undoubtedly printed and executed hundreds of thousands of agreements exactly like the one at issue here. Inasmuch as the arbitration process is a creature of contract, as the Court has repeatedly held it is, DWR had the ability and opportunity to impose explicit conditions precedent to arbitration. *County of Rockland v. Primiano Constr. Co.*, 51 N.Y.2d 1, 9, 431 N.Y.S.2d 478, 482 (1980). *Mastrobuono* left open the possibility that a brokerage firm could draft a standard-form agreement that would clearly and unequivocally deprive the arbitrators of the authority to award punitive damages. Similarly, unless it ran afoul of regulatory requirements, DWR could have

provided clearly and unequivocally that a court would decide issues such as timeliness.

If it is arguable that the 1992 Agreement is unclear, DWR deliberately drafted it that way. It is logical to assume that DWR and other brokerage houses employ this tactic for one reason, to subject customers who sue them to prolonged and expensive litigation in order to wear them down and eventually force them to give up.

Howsam did not draft, edit, or alter any portion of the 1992 Agreement. Nor did she have the opportunity to influence the specific provision of the Code that now applies to her claim in arbitration. *Bybyk*, 81 F.3d at 1199. She, and many other customers like her, simply signed an agreement, as a precondition to doing business with DWR, which advised her that *all* disputes concerning her securities account must be handled through arbitration. DWR now seeks to enjoin the very same arbitration that it initially required as a prerequisite to doing business with it.

In a similar case against DWR, the Florida Court of Appeals stated:

> For its own purposes, Dean Witter *chose* to draft customer agreements requiring customers to submit to arbitration of 'any controversy.' It is not surprising that, in circumstances like those presented in this case, Dean Witter would now prefer the procedural and substantive advantages of a judicial forum for the prompt and dispassionate application of such legal defenses as the statute of limitations. But Dean Witter elected a different, nonjudicial forum for resolution of 'any controversy' with its customers. Having provided for arbitration in its customer

agreement, Dean Witter will have to trust the arbitrators to do their jobs properly.

Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681, 686 (Fla. Dist. App. 1992) (emphasis added).

B. The Plain Language of the Agreement Provides "Clear and Unmistakable" Evidence Of Intent to Arbitrate Timeliness

The language of the 1992 Agreement itself satisfies the "clear and unmistakable" standard. Thus, consideration of § 10324 may be unnecessary. The arbitration clause in the 1992 Agreement, a pre-printed form agreement prepared by DWR, similar to most standard arbitration clauses, provides that "*all* controversies" between Howsam and DWR, including the "construction . . . of this or any other agreement between" them "shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member." J.A. 7. The agreement also states that the "parties are waiving their right to seek remedies in court, including the right to jury trial." J.A. 6. The 1992 Agreement further states in paragraph 18 that "[t]his Agreement shall be construed and enforced in accordance with the laws of the State of New York without reference to choice of law doctrine." J.A. 6. This agreement has three significant features, each of which displays an intent to have the arbitrators decide questions arising under the eligibility rule.

1. The Broad Inclusive Agreement Demonstrates the Parties' Intent to Allow the Arbitrators to Decide Timeliness

The parties agreed, as broadly as possible, to the arbitration of "*all controversies*." The phrase "all controversies" presumably includes the controversy over who should determine timeliness of the claims. Indeed, inasmuch as agreements to arbitrate are "generously construed," *Mitsubishi*, 473 U.S. at 626, it is sensible to interpret "all controversies" to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court. *Mastrobuono*, 514 U.S. at 61 n.7.

Although neither *AT&T* nor *First Options* specifies language which would satisfy the "clear and unmistakable" standard, neither opinion implied that only an explicit statement in the contract would suffice. Here, the drafting party used the term "all" to define the scope of the arbitration agreement. The word "all" is defined as "wholly; completely; altogether; entirely." *Webster's Revised Unabridged Dictionary*, 1998. Without literally stating "the parties clearly and unmistakably intend for the arbitrators to decide issues arising under § 10304," it is difficult to imagine how the parties could more clearly have expressed their intentions.

This concept was addressed by the Second Circuit in *Bybyk*. In *Bybyk*, testing the pre-dispute arbitration agreement against the *First Options* standard of "clear and unmistakable" evidence that the parties agreed to submit arbitrability to the arbitrators, the Second Circuit found the plain language of the agreement all-encompassing. 81 F.3d at 1199-1200. The agreement at issue here is virtually identical to the agreement at issue

in *Bybyk*. The parties' broad grant of power to the arbitrators is unqualified by any express limitations or restrictions on either (1) the time to commence arbitration or (2) the arbitrators' power to determine eligibility rule issues. DWR is thus unable to overcome the presumption established in the 1992 Agreement that "all controversies" are to be arbitrated. Put another way, no draftsman seeking a six year limitation on the scope of arbitrability would craft this language to accomplish that objective. *Id.* at 1200.

2. The Parties Waived Their Right to Seek Redress in the Courts

By signing the agreement and assenting to its terms, the parties waived their right to seek redress in the courts of "all controversies" arising from the 1992 Agreement, including their right to jury trial. By its plain language, this provision operates as an outright waiver of DWR's right to seek judicial remedies preventing an alleged untimely claim from being submitted to arbitration, once the threshold issues of the existence of an agreement to arbitrate and subject matter are determined.

3. Interpretation Of the Agreement Is Governed By New York Law

In *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), the Court confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the FAA; (2) the FAA does not preempt the entire area of arbitration but only

requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements. *Id.* at 475-476.

Volt involved the interpretation of a construction contract, which, like the agreement in the instant case, contained an agreement to arbitrate all disputes arising out of the contract and a choice of law clause providing that the contract would be governed by the "law of the place where the project was located." In affirming the California Court of Appeals' decision to apply the California Arbitration Act to the parties' dispute, the Court explained, "the FAA does not require parties to arbitrate when they have not agreed to do so . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478. The California court stated:

> Where, as here, the parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be 'inimical to the policies underlying state and federal arbitration law' because it would 'force the parties to arbitrate in a manner inconsistent with their agreement.'

Id. at 472 (citations omitted).

In *Mastrobuono*, the Court reaffirmed its prior holdings in *Volt* that under the FAA, arbitration agreements must be enforced according to their terms, even if such

terms call for application of state arbitration law, and that judicial construction of contracts is a matter of state law. In that same vein, the Court, in *First Options*, affirmed the principle that arbitration agreements should generally be construed in accordance with state law principles of contract construction. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Just as parties may limit by contract the issues which they will arbitrate, *Mitsubishi*, 473 U.S. at 626, so too may they specify by contract the rules under which the arbitration will be conducted. *Mastrobuono*, 514 U.S. at 61.

Howsam and DWR expressly agreed that New York law would govern the interpretation and enforcement of their dispute. In 1997, the New York Court of Appeals[6] decided *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997). In that case, following the Court's decisions in *Volt*, *Mastrobuono*, and *First Options*, the court stated that arbitrability is generally a matter for judicial determination but may be decided by arbitrators if the parties "clearly and unmistakably" so provide. *Sacharow*, 689 N.E.2d at 887-888. The court held that where the parties had agreed to arbitrate "any and all controversies," the issue of eligibility under § 10304 was arbitrable.

In the last paragraph of the opinion, Judge Bellacosa, writing for a unanimous court, stated:

[6]The New York Court of Appeals is that state's highest court.

> Lastly, it would be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements. Having agreed to plenary arbitration, they should not garner that strategic advantage against their aggrieved or dissatisfied customers.

Id. at 889.

Thus, by agreeing to arbitrate "all controversies" between the parties, including controversies arising from construction of the agreement, agreeing to waive its right to seek remedies in court, and agreeing to apply New York law, DWR intended that the arbitrators decide which claims are eligible for arbitration under § 10304.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to reverse the judgment of the Tenth Circuit and to order it to remand the case to the District Court for dismissal of DWR's action in accordance with its judgment.

Dated: Denver, Colorado

May 28, 2002

Respectfully submitted,

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